Supreme Court, U.S.
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No. 02-970

In The

Supreme Court of the United States

MGM GRAND HOTEL, LLC,

Petitioner,

v.

MEDINA RENE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether summary judgment improperly was granted against an employee who, in his action brought under Title VII of the Civil Rights Act of 1964, provided extensive evidence that his supervisor and coworkers subjected him to severe and pervasive harassment because of sex?

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STATEMENT OF THE CASE

In considering the motion for summary judgment filed by Petitioner MGM Grand Hotel, LLC ("Petitioner"), the courts below had before them "extensive evidence" that, for two years, Respondent Medina Rene ("Respondent" or "Rene") was subjected by his supervisor and fellow employees "to a hostile work environment on almost a daily basis." Petitioner's Appendix ("App.") at 1a.[1] The harassment was severe and pervasive and was based on Respondent's being male, as well as on his supervisor's and co-workers' view that he did not meet their stereotypical expectations of how men should act. Respondent testified at his deposition that he was harassed in these ways "practically every day" he worked for Petitioner, and that this harassment included, among other things, many instances of other employees grabbing his male genitals and shoving their fingers into his anus. See App. at 3a.

Numerous facts showed that Respondent's sex was a motivating factor for this near-daily harassment, including the nature of the physical assaults to which he was subjected; his harassers' repeated attempts to disparage his manhood by subjecting him to gender-based, humiliating pranks and treating him as if they were making sexual advances to a woman; his harassers' use of female terms of

[1] Petitioner's Statement of the Case erroneously suggests that Respondent was harassed only by "nonsupervisory co-workers." See Petition for Certiorari ("Pet.") at 2, 4. To the contrary, Respondent alleged and submitted substantial evidence that his direct supervisor also was an active perpetrator of the harassment. See App. at 2a. Respondent also disputes Petitioner's assertion that there was any valid reason for Petitioner to terminate him after he filed complaints about being sexually harassed. See *id.*

endearment to refer to him; and their mean-spirited teasing of him at work about the way he walked. See App. at 2a-3a, 12a.

Respondent complained to Petitioner, to the Nevada Human Rights Commission and the EEOC, and to the federal district court about discrimination because of his sex (not his sexual orientation) and sexual harassment (not sexual orientation harassment).[2] Notwithstanding this, Petitioner repeatedly has attempted to use the fact that Respondent is gay to recharacterize this case as one only about sexual orientation discrimination.[3]

The district court was misled by Petitioner's arguments and granted summary judgment against Respondent. Ignoring evidence that Respondent was harassed because of his sex, the district court ruled that Respondent had failed to state a claim cognizable under Title VII because that law does not "include discrimination based on sexual preference." App. at 50a. Similarly, the majority of the original panel of the Court of Appeal concluded that Rene's harassment was based only on his sexual orientation,

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[2] See App. at 3a.

[3] Contrary to Petitioner's assertion, see Pet. at 2, sexual orientation discrimination and harassment was not Respondent's "theory of the case." Rather, Rene's Complaint alleged that he was sexually harassed and made no reference to his sexual orientation. Likewise, in his opposition to Petitioner's motion for summary judgment and briefs to the Court of Appeal, Respondent focused principally on how his sexual orientation did not *defeat* his having a claim for sexual harassment and how, but for his being male, he would not have been harassed as he was. As explained below, Respondent's answers to Petitioner's deposition questions also do not determine Respondent's theory of the case or undermine his claim that his sex was one of the motivating factors for the harassment he suffered.

which it held "does not fall within the prohibitions of Title VII." App. at 43a.

Sitting en banc, the Ninth Circuit reversed the district court's grant of summary judgment and remanded for further proceedings. No opinion of the en banc court commanded a majority. Although seven of the eleven judges agreed that summary judgment should be reversed, *none* of the members of the en banc panel concluded that sexual orientation discrimination is prohibited by Title VII. Rather, a five-judge plurality held that the fact that Rene was gay was simply irrelevant, App. at 1a, 7a, and three judges who concurred in the result (one of whom also joined the plurality) relied not on Rene's sexual orientation, but on "ample evidence" that the harassment – which involved, among other things, calling Rene feminine names and treating him "like a woman"– was based on the harassers' perception that Rene was not sufficiently masculine. App. at 12a-14a.

Petitioner's characterizations of these opinions is misleading. The plurality opinion did not hold that "gender is not the issue" in a sexual harassment case. See Pet. at 6. Rather, the plurality followed this Court's decision in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), that an employee can sue for sexual harassment by members of the same sex when he shows that "he suffered discrimination" because of his sex. App. at 10a. Likewise, contrary to Petitioner's arguments, Pet. at 6, the plurality *expressly* disclaimed the view that a viable Title VII claim would exist in every case in which an employee suffers a physical assault directed at a sexually identifiable part of the body. App. at 11a. Instead, the plurality concluded only that Respondent had presented enough "to survive a defense motion for summary judgment," *id.*, because he

adequately had shown that, in his case, the offensive conduct to which he was subjected not only "was sexual," but also "was discriminatory." App. at 10a.

Similarly, the concurrence joined by three judges – which neither expressly agreed nor disagreed with the rationale of the plurality opinion – did not hold that sexual orientation harassment is actionable under Title VII. See Pet. at 7, 20. Rather, these judges concluded that the evidence thus far presented of co-workers teasing Respondent at work about the way he walked, referring to him by feminine terms, and "in a variety of ways" treating him "'like a woman'" was sufficient to overcome Petitioner's motion for summary judgment. That determination was based on direct precedent permitting reliance on evidence of gender stereotyping as a way of showing discrimination because of sex. App. at 12a.

As Petitioner itself has stated to the press, this case remains at a stage where Respondent's allegations have not yet "been established" because they "have never been before a jury." Henry R. Weinstein & Lisa Girion, *Gay Man's Sexual Harassment Lawsuit Ruled Worthy of Trial*, L.A. TIMES, Sept. 25, 2002, at A18. All that the seven judges who voted to remand agreed on was that Respondent should be given the opportunity to establish those allegations, and that he should not be precluded from doing so at this stage of the proceedings simply because he is gay. As demonstrated below, this case accordingly does not present any cert.-worthy questions and is not in a posture where review by this Court would be warranted.

REASONS FOR DENYING THE PETITION

Petitioner lists three questions as presented in this case. Pet. at i. The first question – "Whether Title VII of the Civil Rights Act of 1964 prohibits harassment based on sexual orientation" – is not presented here because none of the judges on the en banc court below ruled that harassment based on sexual orientation is prohibited by Title VII. The Ninth Circuit's precedent is to the contrary and is in accord with the other courts of appeal that have ruled on the issue.

The second question – "Whether Title VII harassment cases are cognizable without proof that the harassment occurred 'because of . . . sex' – also is not presented here. Once again, no opinion below so ruled. Instead those opinions presented different ways in which Respondent might show that he was harassed because of his sex, with no opinion garnering more than five votes of the eleven-member en banc panel. As a result, the most that can be said about the ruling of the en banc court is that a majority of the judges on the panel believed that factual issues precluded summary judgment and that Respondent should not be precluded from showing that he was harassed because of his sex solely due to his being gay.

The third question – "Whether a sexual orientation discrimination case becomes cognizable under Title VII if restyled as a case involving 'gender stereotyping'" – likewise is not presented here. First, this is not a "sexual orientation discrimination case." In addition, although eight of the eleven en banc judges agreed that evidence of gender stereotyping can be used to demonstrate that harassment is "because of . . . sex," four of those judges and one other expressed the view that this position had

not adequately been developed in the case, while six judges either ruled that Respondent had raised the issue adequately or expressed no view. In any event, this is not an issue appropriate for this Court's review at this time, because there is no split in the circuits on whether discrimination or harassment "because of . . . sex" can be shown through evidence of gender stereotyping. Thus, as demonstrated below, there is no basis for granting the petition for certiorari.

I. Whether Title VII Prohibits Harassment Based on Sexual Orientation Is Not a Question Presented by this Appeal

Petitioner argues that the Court of Appeals' decision conflicts with other circuit opinions that have held that Title VII does not prohibit sexual orientation discrimination. Pet. at 17. The problem with Petitioner's argument is that there is no conflict. It has been the law in the Ninth Circuit for over two decades that sexual orientation discrimination is not prohibited by Title VII, *DeSantis v. Pacific Telephone and Telegraph Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979), and the decision below did not hold to the contrary.[4]

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[4] In *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 875 (9th Cir. 2001), a Ninth Circuit panel rejected *DeSantis*' separate holding that Title VII's prohibition of sex discrimination does not extend to "discrimination based on a stereotype that a man 'should have a virile rather than an effeminate appearance.'" However, *DeSantis*' holding that employment discrimination based only on sexual orientation is not prohibited by Title VII has remained the law in the Ninth Circuit both before and after *Nichols*. *See, e.g.*, *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1537 (9th Cir. 1992); *Chambers v. City of Berkeley*, 2002 U.S. Dist.

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Indeed, far from concluding that sexual orientation discrimination is barred by Title VII, the plurality opinion of the en banc panel instead repeatedly and expressly "hold[s] that an employee's sexual orientation is *irrelevant* for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment." App. at 1a (emphasis added); *see also id.* at 1a-2a ("That the harasser is, or may be motivated by hostility based on sexual orientation is similarly irrelevant, and neither provides nor precludes a cause of action"), 7a (sexual orientation of the victim is irrelevant regardless of his or her sex), 11a (sexual harassment is prohibited "without regard to the sexual orientation – real or perceived – of the victim"). Likewise, the opinion of the three judges who concurred in the result does not hold that sexual orientation discrimination is prohibited by Title VII, but rather that Respondent has an actionable claim for sexual harassment because of the existence of evidence that he was subjected to gender stereotyping. App. at 11a, 14a. See also App. 15a (separate concurrence of Circuit Judge Graber, expressly stating that "Title VII does not protect employees from discrimination because of sexual orientation," which she describes as an issue that the majority of the en banc panel "does not reach").

Petitioner in fact concedes that neither the opinion of the plurality nor the three-judge opinion concurring in the result actually asserts that Title VII prohibits harassment based on sexual orientation. Pet. at 10. Instead, Petitioner

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Lexis 4637, *12-*13 (N.D. Cal. 2002). None of the judges below questioned this. See App. at 28a (explaining that "this aspect of *DeSantis* remains good law").

argues that this is their effect. *Id.* As to both opinions, however, Petitioner is mistaken.

The plurality opinion does not in any way rely on Respondent's sexual orientation to reach its conclusion that, in this case, adequate evidence of harassment "because of . . . sex" was presented in order to preclude summary judgment. Rather, viewing the facts in the light most favorable to Rene – as is required in ruling on a motion for summary judgment – the plurality saw before it "a man who was repeatedly grabbed in the crotch and poked in the anus" (that is, who was subjected to severe and pervasive conduct of a sexual nature), "and who was singled out from his other male co-workers" (that is, was "treated differently" or discriminated against) "based on sex," and not on sexual orientation (or at least not on sexual orientation alone). App. at 10a. It is only by taking sentences of the plurality opinion out of context and ignoring the entirety of that opinion that Petitioner can argue otherwise. See Pet. at 6, 11, 12, 17, 18; see also App. at 15a (concurring opinion of Circuit Judge Fisher, concluding that "The repeated physical attacks targeted at body parts clearly linked to Rene's gender constituted overwhelming evidence from which a jury could infer that the attacks were based, at least in part, on Rene's sex.").[5]

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[5] Petitioner appears to argue that the plurality must have dispensed with any need to show that Rene was harassed because of his sex, based on how Rene answered deposition questions that asked him to speculate about why his harassers engaged in certain conduct. Pet. at 3, 6. Rene's responses that he thought the conduct was directed at him because he was gay, however, no more defeats his claim of harassment "because of . . . sex" than would the answer of a female employee that she thinks her supervisor fondled her because she has red hair and

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Likewise, the three-judge concurrence does not "in effect" hold that harassment based on sexual orientation is prohibited by Title VII. That opinion does not rely on the fact that Rene is gay to conclude that Rene's supervisor and co-workers harassed him by engaging in gender stereotyping. Rather, the opinion relies on evidence that these other men teased Rene about the way he walked, whistled at him "like a man does to a woman," repeatedly called him feminine names, and in a variety of other ways treated him "like a woman," App. at 12a, which all address qualities directly related to gender, not sexual orientation. Furthermore, the concurrence says nothing that would permit a Title VII claim by an employee repeatedly subjected to anti-gay attacks that are not based on gender stereotypes (such as pervasive vilification of gay people as

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he likes redheads. Admitting her supervisor's penchant for redheads would not defeat her Title VII case as being one that is only about non-actionable, hair color discrimination. Instead, a sexual harassment claim is available in both her case and Rene's because Title VII provides that "an unlawful employment practice is established when the complaining party demonstrates that ... sex ... was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m); *see Spearman v. Ford Motor Co.*, 1999 U.S. Dist. LEXIS 14852 at *22, n.4 (N.D. Ill. 1999), *aff'd*, 231 F.3d 1080 (7th Cir. 2000), *cert. denied*, 532 U.S. 995 (2001) ("Harassment can be motivated by many factors – sex as well as sexual orientation – and just because one discriminatory motivation as of yet is not recognized as impermissible under Title VII does not release the employer from liability for discrimination because of sex under Title VII."). As the plurality opinion below explained: "The physical attacks to which Rene was subjected, which targeted body parts clearly linked to his sexuality, were 'because of ... sex.' Whatever else those attacks may, or may not, have been 'because of' has no legal consequence." App. at 7a.

mentally ill, dirty, depraved or diseased or as "sex fiends" or child-molesters).

Petitioner's assertion that it is "obvious" that, when an employee is harassed due to perceived non-conformity to gender stereotypes, this must be due to the harassers' perception that the employee is gay, and that therefore only non-actionable sexual orientation discrimination is occurring, Pet. at 20, encapsulates the error of the district court and original panel majority. Knowing that Rene is gay, these courts improperly ruled that the evidence in this case could *only* be interpreted as being about his sexual orientation and not his sex. See App. at 32a, 50a. As the Third Circuit has explained, this must be wrong. *See Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 262-64 (3rd Cir. 2001), *cert. denied*, 534 U.S. 1155 (2002) ("had the plaintiff in *Price Waterhouse* been a lesbian, that fact would have provided the employer with no excuse for its decision to discriminate against her because she failed to conform to traditional feminine stereotypes.").

Thus, because no judge below decided that sexual orientation discrimination is prohibited by Title VII, that issue – as to which there is no conflict among the circuits – simply is not presented here.

II. Whether Title VII Harassment Cases Are Cognizable Without Proof That the Harassment Occurred "Because of . . . Sex" Also Is Not a Question Presented by this Appeal; Taken Together, the En Banc Opinions below Decided Only That Factual Issues Precluded Summary Judgment

The second question that Petitioner tenders also is not presented here. First, as explained above, neither the en banc plurality opinion nor the three-judge concurrence held that Title VII harassment cases are cognizable without proof that the harassment occurred "because . . . of sex." To the contrary, the plurality opinion found that there was enough evidence to entitle Rene to a trial on whether the harassment he suffered was "because of . . . sex" based on inferences that could be drawn from the grabbing of his male body parts and the discriminatory singling out of Respondent "in comparison to other men." App. at 7a, 10a. Likewise, the three judge concurrence found that harassment "because of . . . sex" could be established at trial based on the evidence Rene presented of gender stereotyping. App. at 12a, 14a.

Neither the plurality opinion nor the three-judge concurrence addresses the conclusions of the other. See App. at 11a (describing the two opinions as reaching "the same result but under a different rationale"). One judge joined both opinions, App. at 11a, and another joined the plurality and wrote a separate concurring opinion agreeing with a portion of the three-judge concurrence. App. at 15a-16a. With four opinions and a dissent, each with different reasoning, it is difficult to discern what, if any, precedent might be established by the decision other than that summary judgment should not have been granted

against Respondent. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of [the majority], 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .'") (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)); *see also Hale v. Arizona*, 967 F.2d 1356, 1365-66 (9th Cir. 1992) (applying *Marks* rule to fragmented court of appeal decisions), *reheard en banc*, 993 F.2d 1387 (without discussion of this point), *cert. denied*, 510 U.S. 946 (1993).

Indeed, contrary to Petitioner's assertions, neither the plurality opinion nor the three-judge concurrence makes sweeping pronouncements about the law calling for this Court's intervention. Both wrestle with jurisprudence that remains at early stages of development within the lower courts,[6] and simply permit further factual development rather than depriving Respondent – solely because he is gay – of the same opportunity any other Title VII plaintiff has to make a factual showing that he was harassed "because of . . . sex."

The limited precedential value of such a split decision is especially marked within the Ninth Circuit, and makes this case, and the issues identified by Petitioner, particularly unworthy of review by the Court at this juncture. *See*

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[6] See Section III hereof, below. *See also Bibby*, 260 F.3d at 262 (describing how to prove that harassment is "because of sex" as not an easy question to answer).

Lewis v. University of Pittsburgh, 725 F.2d 910, 930 n.10 (3rd Cir. 1984) ("en banc decisions in the Ninth Circuit are necessarily the product of a minority of that Court's members"). Here, because there is no majority opinion and it is difficult to determine the narrowest grounds that supported reversal of the trial court's grant of summary judgment against Respondent, the fractured en banc decision is unlikely to have much precedential effect even within the Ninth Circuit, and the issues the court considered may well be revisited and decided in a different and clearer fashion by another en banc panel of the Ninth Circuit at some later date.

It is important to recognize as well that this case itself is not yet over. It simply has been remanded for further proceedings and may be resolved in such a way that neither party would seek this Court's review. Alternatively, a decision based on the evidence adduced upon remand might present the issues more clearly for review by the Ninth Circuit and potentially by this Court at a later date. The only question before the Court at this point is whether the evidence in this case of near-daily, on-the-job sexual assaults, touchings, teasing, pranks, and references to Respondent by female terms over a two-year period was sufficient to permit a fact-finder to infer that Respondent was subjected to a hostile work environment because of his sex, and therefore whether Petitioner's motion for summary judgment should have been denied. While important

to these parties, this fact-bound issue is not one that demands this Court's time.[7]

III. There Is No Split in the Circuits on Whether Discrimination Because of Sex Can Be Shown Through Evidence of Sexual Stereotyping

Three judges of the en banc court below joined an opinion concluding that discrimination or harassment "because of . . . sex" can be shown based on evidence of gender stereotyping, App. at 11a-14a, and a fourth judge wrote separately to agree with this conclusion, App. at 16a.[8] In addition, the four dissenting judges agreed that "discrimination based on sex stereotyping" is a type of gender discrimination that is actionable under Title VII,[9] although they

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[7] As this Court explained in *Oncale*, such a determination is unusually fact-intensive, requiring not only that the harassing conduct be judged from the perspective of a reasonable person in the employee's position, considering "all the circumstances," (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993)), but also that "careful consideration" be given to "the social context in which particular behavior occurs and is experienced by its target." 523 U.S. at 81.

[8] As noted above, the plurality opinion simply does not address the gender stereotyping issue.

[9] As the dissenters recognized, the Ninth Circuit already had held this to be the law in *Nichols*, 256 F.3d at 874-75. See App. at 31a. *See also Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000), in which the Ninth Circuit, in an even earlier decision, interpreted the Gender Motivated Violence Act, by analogy to Title VII, as encompassing discrimination against those "who do not conform to socially-prescribed gender expectations."

concluded that Respondent had not adequately asserted a claim based on that form of proof. App. at 20a, 30a.[10]

While several district courts in other circuits also have held that evidence of gender stereotyping may be used to prove that discrimination was based on sex,[11] no other court of appeal other than the Seventh Circuit [12] has issued a definitive ruling on this issue since this Court's ruling in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), let alone *rejected* the position that evidence of gender stereotyping can provide proof of discrimination based on sex.[13] Hence, there can be no split in the circuits on this

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[10] One judge who joined the majority opinion also wrote separately to express agreement with the dissent's view that Respondent had not adequately presented a claim arising out of gender stereotyping. App. at 15a.

[11] *See, e.g., Centola v. Potter*, 183 F. Supp. 2d 403, 408-10 (D. Mass. 2002); *Ianetta v. Putnam Invs., Inc.*, 142 F. Supp. 2d 131, 133-34 (D. Mass. 2001); *Jones v. Pac. Rail Services*, 2001 U.S. Dist. LEXIS 1549, *3-*6, 85 Fair Empl. Prac. Cases (BNA) 90, 79 Empl. Prac. Dec. (CCH) P40407 (N.D. Ill. 2001).

[12] *See Doe v. City of Belleville*, 119 F.3d 563, 580-83 (7th Cir. 1997), *vacated and remanded* "for further consideration in light of *Oncale* . . . ," 523 U.S. 1001 (1998), which *Bibby* concludes is still good law with respect to *Doe*'s holding (which is in accord with the three-judge concurrence in this case) that sex discrimination can be proven with "evidence that the victim's harassers sought to punish him for failing to live up to expected gender stereotypes." 260 F.3d at 263 n.5; *see also Hamm v. Weyauwega Milk Products, Inc.*, 199 F. Supp. 2d 878, 888-89, and 889 n.7 (E.D. Wis. 2002) (continuing to treat this aspect of *Doe* as valid Seventh Circuit authority).

[13] *See Bibby*, 260 F.3d at 262-64 (stating that "a plaintiff may be able to prove that same-sex harassment was discrimination because of sex by presenting evidence that the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender," but finding that the appellant before the court had failed to allege or argue this); *Simonton v. Runyon*, 232 F.3d 33, 37-38 (2d Cir.

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issue, because the Ninth Circuit and Seventh Circuits are the only courts of appeal to have reached an actual holding on the issue, and their decisions are consistent.[14]

Petitioner's argument that a "clear conflict exists" between courts that have declined to rule definitively on whether evidence of sexual stereotyping can establish the "because of . . . sex" element in Title VII cases (although indicating in dicta that they believe it can but that the issue was not adequately raised in the specific cases before them) and the Ninth Circuit's decision in this case (where

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2000) (stating that this Court in *Price Waterhouse v. Hopkins*, "implied that a suit alleging harassment or disparate treatment based upon nonconformity with sexual stereotypes is cognizable under Title VII as discrimination because of sex," but declining to reach this issue on the grounds that it had not been pled or presented adequately below); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085-86 (7th Cir. 2000), *cert. denied*, 532 U.S. 995 (2001) (stating that "sex stereotyping may constitute evidence of sex discrimination," but concluding that employee in the case before it was not harassed on this basis); *Higgins v. New Balance Ath. Shoe, Inc.*, 194 F.3d 252, 259-60, 261 n.4 (1st Cir. 1999) (stating that "just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, . . . a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity," but concluding that appellant before it did not adequately raise or develop such a claim to the trial or appellate courts).

[14] Petitioner's attempt to conjure up a conflict by citing several cases that have allowed dress and grooming policies that impose different, but comparable, requirements on men and women, Pet. at 14 and 14 n.10, is unavailing, as the Ninth Circuit has not indicated that it disagrees with those cases. *See Nichols*, 256 F.3d at 875 n.7. That the distinction between being harassed based on stereotyped expectations of masculinity and femininity and being required to comply with appropriate dress and grooming codes may not yet have been clearly enough enunciated by the Ninth Circuit to satisfy Petitioner does not create a conflict that this Court needs to resolve.

four of the eleven judges of the en banc panel concluded that Petitioner adequately had presented such a claim, five disagreed, and the remaining two did not express a view on the subject), see Pet. at 21, is not the sort of substantial conflict that warrants a grant of certiorari.

Furthermore, Petitioner's assertion that this case conflicts with other cases that allow evidence of sexual stereotyping *only* about "on-the-job conduct" does not accurately distinguish this case in which, among other things, Rene was harassed about the way he walked at work, just like one of the employees allowed to sue in *Nichols*, 256 F.3d at 870, 874. Petitioner also mischaracterizes the dicta in the other, supportive circuit court cases, none of which drew any distinction between harassment based on sexual stereotyping regarding an employee's "on-the-job" versus "off-the-job" conduct. Even the *Price Waterhouse* plurality itself did not draw such a distinction, instead stating – in terms not qualified by the "on-the-job" limitation Petitioner invents – that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." 490 U.S. at 250.[15]

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[15] Moreover, Petitioner's fabricated rule that employees should be protected against discrimination based only on a reaction to how they act *in the workplace* has no basis in Title VII law. For example, employees harassed because of the way they practice religion entirely outside of work are not denied recovery under Title VII. *See, e.g., Campos v. City of Blue Springs*, 289 F.3d 546, 551 (8th Cir. 2002). Similarly, to establish a claim for harassment because of national origin, an employee need not show that the abuse directed against him was due to on-the-job manifestations of his heritage. *See, e.g., Amirmokri v. Baltimore Gas & Elec. Co.*, 60 F.3d 1126, 1131 (4th Cir. 1995).

The ways in which employees can prove that they were subjected to discrimination or harassment "because of . . . sex" are still being developed by the lower courts. *See Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1009 (7th Cir. 1999) ("the means of proving discrimination cannot be reduced to rigid formulae;" "What matters . . . is not whether the facts . . . alleged correspond exactly to any of the examples the Supreme Court has identified, but whether a reasonable factfinder could infer from those facts that [the employee] was harassed 'because of' his sex."); *Hamm*, 199 F. Supp. 2d at 890 ("the law governing same-sex sexual harassment is in its infancy and continues to evolve"). Particularly here, where the plurality opinion of the en banc panel did not even address the gender stereotyping theory, and where the case simply has been remanded for Respondent to prove that he was subjected to discrimination "because of . . . sex," there is no need for this Court to preempt the normal development of the case law in the lower courts or to preclude Respondent from attempting to prove his case.[16]

[16] In this way, this case is very similar to *Oncale*, in which this Court likewise remanded the employee's case for further proceedings to determine whether co-worker sexual assaults very similar to those also inflicted on Rene were indeed "because of . . . sex." 523 U.S. at 79-82.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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